

JANUARY 1999 SUPPLEMENTAL HEADNOTES

OFFICE OF ADMINISTRATIVE HEARINGS DEPARTMENT OF COMMERCE & CONSUMER AFFAIRS STATE OF HAWAII

January 20, 1999

The attached ***January 1999 Supplemental Headnotes*** is intended for use in conjunction with the ***February 1998 Compilation of MVI Headnotes*** and updates that publication through the end of 1998. Future supplements are anticipated to be issued pending the less frequent republication of the main volume.

Copies of the January 1999 Supplemental Headnotes have been provided to the Hawaii Supreme Court Library, the University of Hawaii Law Library, and the Hawaii State Bar Association (available on line at the HSBA Home Page, <http://hsba.org>), as well as the Hawaii State Library. A copy on diskette may also be obtained from the Office of Administrative Hearings by submitting a written request together with a blank diskette, or by submitting \$2.00 for a printed copy.

Richard A. Marshall
Administrative Hearings Officer

MOTOR VEHICLE NO-FAULT INSURANCE SUPPLEMENTAL HEADNOTES

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January 1999

A

Attorney's Fees/Costs - In order for a respondent to be awarded attorney's fees or costs under the particular provisions of HRS § 431:10C-211 it must be shown that the claim being pursued by the claimant was "fraudulent or frivolous" in the sense of being manifestly and palpably without merit and indicative of bad faith on the part of the person making the claim. Hough v. State Farm, MVI 94-484 (CFO August 28, 1998).

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Attorney's Fees/Costs - A provider is - by statute - entitled to an award of attorney's fees and costs pursuant to HRS § 431:10C-211 as "a person making a claim" so long as the award is justified in the discretion of the Commissioner. HEPA, Inc. v. State Farm, MVI 96-1024 (CFO August 4, 1998).

B

Basis of Denial - "[A] respondent's unlimited and/or future denial of certain no-fault benefits (based upon the peer review report of a treatment plan - yet beyond the scope of the treatment plan) is contrary to the statutory provisions set out in HRS § 431:10C-304(3), and thus at least that portion of the denial is improper and invalid on its face." Vea v. Liberty Mutual, MVI 96-793-C+ (CFO September 11, 1998).

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Basis of denial - A respondent's partial payment of no-fault benefits without issuing written notification of a denial for the unpaid balance of the claim(s) constitutes a violation of the requirements in HRS § 431:10C-304(3). HEPA, Inc. v. State Farm, MVI 96-1024 (CFO August 4, 1998).

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Basis of denial - A denial of benefits may be constructed to effectuate the statutory intent of allowing claimants or providers to request an administrative hearing under circumstances where a respondent has failed to comply with mandatory notification requirements set out in HRS § 431:10C-304(3). HEPA, Inc. v. State Farm, MVI 96-1024 (CFO August 4, 1998).

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Basis of Denial - "[T]he procedurally improper activities of Respondent, where it paid only a part of the claims submitted for payment and thereafter knowingly and deliberately failed to issue a written notice of denial of the unpaid portion, obligated it to pay the balance of the outstanding claims submitted by Provider." HEPA, Inc. v. State Farm, MVI 96-1024 (CFO August 4, 1998).

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Burden of Proof - The possibility that the injuries for which a claimant is seeking no-fault benefits are related to a qualifying accident does not satisfy the standard of proof to establish causation, and the probability of such a connection decreases significantly where there has been a substantial passage of time between the accident and the subsequent treatment and/or inconsistencies between the claimant's statements and his or her medical records. Kuhiki v. State Farm, MVI 95-616 (CFO October 26, 1998).

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Burden of Proof - The analysis of a mechanical engineer (concerning the force of impact involved in a motor vehicle accident) - as well as the results of an independent medical examination which placed great reliance on the mechanical engineer's analysis - while of some interest, was not persuasive in determining whether the claimant's injuries were accident related. Aila v. AIG Hawaii, MVI 94-390 (CFO October 21, 1998).

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Burden of Proof - "The submission of a speculative treatment plan - such as the one prepared for the Claimants in this matter [p.r.n. or 'as needed' care] - does not allow for a definitive assessment of its content by either a respondent or a peer reviewer, and as such does not conform to the applicable provisions of the Hawaii motor vehicle insurance law nor the administrative rules and cases adopted in support of that law. Vea v. Liberty Mutual, MVI 96-793-C+ (CFO September 11, 1998).

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Burden of Proof - "[I]t is worth reemphasizing that a treatment plan proposing p.r.n. (as needed) treatments is inherently suspicious and unlikely to meet the statutory requirements for such documents. While the preparation of treatment plan requests remains an option of the provider, the exercise of this option under HRS § 431:10C-308.6 and HAR § 16-23-95 presupposes knowledge by the provider that the patient/claimant has a specific need for regularly scheduled services for the treatment of specific injuries. It also requires that the timing of visits, the treating modalities, and the intended goals be articulated with reasonable precision. Vea v. Liberty Mutual, MVI 96-793-C+ (CFO September 11, 1998).

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Burden of Proof - The failure of a claimant to testify at an administrative hearing in which he or she is contesting a denial of no-fault benefits may well have adverse consequences, especially where there is not sufficient alternative evidence to demonstrate that the claimant continued to suffer from injuries sustained in the motor vehicle accident or that the claimant's health care treatments were appropriate and reasonable. Jou v. GEICO, MVI 96-766-P (CFO September 10, 1998).

C

Causation - The possibility that the injuries for which a claimant is seeking no-fault benefits are related to a qualifying accident does not satisfy the standard of proof to establish causation, and the probability of such a connection decreases significantly where there has been a substantial passage of time between the accident and the subsequent treatment and/or inconsistencies between the claimant's statements and his or her medical records. Kuhiki v. State Farm, MVI 95-616 (CFO October 26, 1998).

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Causation - The analysis of a mechanical engineer (concerning the force of impact involved in a motor vehicle accident) - as well as the results of an independent medical examination which placed great reliance on the mechanical engineer's analysis - while of some interest, was not persuasive in determining whether the claimant's injuries were accident related. Aila v. AIG Hawaii, MVI 94-390 (CFO October 21, 1998).

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Causation -Although a claimant may be able to show that the requirements for establishing a wage loss claim have been met, it is still essential - as a threshold issue - for the claimant to show that his or her injuries were the result of the motor vehicle accident underlying the claim. Madison v. State Farm, MVI 96-47 (CFO September 14, 1998).

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Causation - "In [citations omitted] the Insurance Commissioner determined that there was no causal connection between the claimants' conditions at the time that no-fault benefits were denied and any injuries which may have arisen out of their motor vehicle accidents where there was a lengthy delay in seeking treatment and inconsistency between claimants' statements and their medical records." Connors v. State Farm, MVI 96-522 (CFO September 4, 1998).

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Causation - Under certain circumstances, in order to establish that a psychological injury meets the statutory definition of accidental harm set out in HRS § 431:10C-103(1) a claimant may have to show that it constitutes a psychiatric disorder as specified by DSM-III-R. Hyman v. State Farm, MVI 95-315-P (CFO September 4, 1998).

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Constructive Denial - A denial of benefits may be constructed to effectuate the statutory intent of allowing claimants or providers to request an administrative hearing pursuant to HRS § 431:10C-212 under circumstances where a respondent has failed to comply with mandatory notification requirements set out in HRS § 431:10C-304(3). HEPA, Inc. v. State Farm, MVI 96-1024 (CFO August 4, 1998).

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Constructive Denial - "The construction of a denial was an equitable device to overcome an insurer's wrongful conduct and [to] implement the intent of the statutory provisions to provide a fair, orderly, and expeditious procedure to address claims for payment of no-fault benefits. Insurers may avoid the application of a constructive denial by simply complying with the provisions of HRS § 431:10C-304(3)." HEPA, Inc. v. State Farm, MVI 96-1024 (CFO August 4, 1998).

M

Motion For Summary Judgment - "A motion for dismissal, or other summary disposition, may be granted as a matter of law where the non-moving party cannot establish a material factual controversy when the motion is viewed in the light least favorable to the moving party." HEPA, Inc. v. State Farm, MVI 96-1024 (CFO August 4, 1998); and, Lee v. AIG Hawaii, MVI 96-979-C (CFO April 14, 1998).

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Motor Vehicle Accident - Where a motor vehicle accident is a "substantial factor" in bringing about a claimant's injury and it is shown that "but for" the motor vehicle accident the injury in question would not have occurred, the claimant has established that the accident was the cause of the injury. Corpus v. State Farm, MVI 95-744 (CFO September 4, 1998).

N

Notification of Denial - A respondent's partial payment of no-fault benefits without issuing written notification of a denial for the unpaid balance of the claim(s) constitutes a violation of the requirements in HRS § 431:10C-304(3). HEPA, Inc. v. State Farm, MVI 96-1024 (CFO August 4, 1998).

P

Peer Review - A respondent may not separate the content/conclusions of a peer review report for use as a separate rationale in an attempt to convert an existing denial of no-fault benefits that was clearly articulated to be based upon the peer review process (set out in HRS § 431:10C-308.6) to a denial of no-fault benefits based upon some other standard (such as set out in HRS § 431:10C-304). Hyman v. AIG Hawaii, MVI 95-817-P+ (CFO October 22, 1998).

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Peer Review - "[A] treatment plan is invalid, and may be rejected by the insurer, if it proposes to commence treatment prior to the time in which the treatment plan may be challenged by the insurer (five working days from the date the treatment plan is mailed to the insurer). Hyman v. USAA, MVI 96-1376-P (CFO October 22, 1998).

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Peer Review - A provider is not a proper party to request a hearing to contest a respondent's denial of no-fault insurance benefits arising out of a motor vehicle accident which occurred prior to January 1, 1993. Hyman v. AIG Hawaii, MVI 95-817-P+ (CFO October 22, 1998; Chart Rehabilitation v. State Farm, MVI 94-199-P (CFO October 3, 1997); and, Redmond v. State Farm, MVI 94-287-P (CFO September 18, 1997 [effectively overruled by Redmond v. State Farm and Graulty, Civil No. 97-4270 (December 11, 1998).

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Peer Review - In the case of Richards v. Metcalf, 82 Haw. 249 (1966) the Hawaii Supreme Court held that utilization of the peer review provisions of HRS § 431:10-C308.6 was inapplicable as a basis for issuing denials of no-fault insurance benefits (claims) arising out of motor vehicle accidents which occurred prior to January 1, 1993. Hyman v. AIG Hawaii, MVI 95-817-P+ (CFO October 22, 1998); Kane v. Firemans Fund, MVI 94-497-C (CFO May 11, 1998); and, Medrano v. State Farm, MVI 94-423-C+ (CFO January 22, 1998).

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Peer Review - A denial of prospective no-fault insurance benefits is not necessarily improper (as a procedural issue) under circumstances where an insurer has issued a peer review challenge to such benefits pursuant to HRS § 431:10C-308.6, and thus to the extent that a contrary position is reflected in Butuyan v. State Farm, MVI 93-257-C (CFO January 9, 1995) that portion of the case is reversed by the Commissioner. Redmond v. State Farm, MVI 94-287-P (CFO September 18, 1997).

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Peer Review - "[I]t is worth reemphasizing that a treatment plan proposing p.r.n. (as needed) treatments is inherently suspicious and unlikely to meet the statutory requirements for such documents. While the preparation of treatment plan requests remains an option of the provider, the exercise of this option under HRS § 431:10C-308.6 and HAR § 16-23-95 presupposes knowledge by the provider that the patient/claimant has a specific need for regularly scheduled services for the treatment of specific injuries. It also requires that the timing of visits, the treating modalities, and the intended goals be articulated with reasonable precision. Vea v. Liberty Mutual, MVI 96-793-C+ (CFO September 11, 1998).

⊕

Peer Review - "The submission of a speculative treatment plan - such as the one prepared for the Claimants in this matter [p.r.n. or 'as needed' care] - does not allow for a definitive assessment of its content by either a respondent or a peer reviewer, and as such does not conform to the applicable provisions of the Hawaii motor vehicle insurance law nor the administrative rules and cases adopted in support of that law. Vea v. Liberty Mutual, MVI 96-793-C+ (CFO September 11, 1998).

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Peer Review - Where a claimant has received treatments under a proposed treatment plan which has subsequently expired the only question is whether the provider should be paid and thus the claimant has no remedial nor justiciable interest in the matter. Therefore, in accordance with Pearson v. GEICO, MVI 94-354-C (CFO July 11, 1996) the matter is moot as far as the claimant is concerned and is appropriate for dismissal by summary adjudication. Toliro v. State Farm, MVI 96-1159-C (CFO September 4, 1998); Sato v. State Farm, MVI 96-587-C+ (CFO September 4, 1998); and, Melchor v. State Farm, MVI 95-233-C (CFO August 24, 1998).

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Peer Review - A respondent's HRS § 431:10C-308.6(c) peer review challenge of "continuing treatment" does not also constitute an HRS § 431:10C-308.6(d) challenge to a particular "treatment plan" since individual plans must be specifically challenged as a basis for any subsequent denial. The provisions of subsections (c) and (d) address different situations and a challenge must accurately reflect the specific subject of the challenge. Olipares v. State Farm, MVI 94-295-C (CFO March 23, 1998).

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Penalty Provisions - Under circumstances where a respondent has knowingly and deliberately violated a provision of HRS Chapter 431, Article 10C, it becomes appropriate to impose sanctions pursuant to HRS § 431:10C-117 which are commensurate with the role of the respondent and the extent of its violations. HEPA, Inc. v. State Farm, MVI 96-1024 (CFO August 4, 1998).

S

Statute of Limitations - "Although the law does not specifically require an insurer to inform a policyholder of the applicability of HRS § 431:10C-315 [Statute of limitations], when an insurer does offer an explanation it is obliged to be complete and accurate in providing such

information." Where such is not the case and the claimant has reasonably and detrimentally relied upon representations made by the insurer, the principle of equitable estoppel may be applicable in preventing an unjust result from arising out of a perfunctory application of that statute. Au v. Liberty Mutual, MVI 94-616 (CFO September 4, 1998).

W

Wage Loss - "The elements necessary to establish entitlement to wage loss benefits are: 1) a physical disability as a result of a motor vehicle accident which results in the inability to engage in gainful activity, and 2) available and appropriate gainful activity which a claimant could not accept because of the physical disability." Madison v. State Farm, MVI 96-47+ (CFO September 14, 1998).

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